

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
VLADISLAV REZNIK, :
:
Plaintiff, : 13-CV-6168 (PKC) (VMS)
:
June 19, 2015
:
V. : Brooklyn, New York
:
VADIM SIMAKOV, :
:
Defendant. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ANDREY BELENKY, ESQ.

For the Defendant: NO APPEARANCE

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1 THE COURT: This is Judge Scanlon.

2 MR. BELENKY: Good morning, your Honor.

3 This is Andrey Belenky from Hymowitz Law Group for
4 plaintiff.

5 THE COURT: Just give me a minute. You're
6 on the line for Reznik v. Simakov, is that correct?

7 MS. KATZ: Yes, correct.

8 THE COURT: Let me just give you the very
9 short version and then we'll give you the longer
10 version. I'm just going to do this decision on the
11 record today. What we'll do is enter a text order and
12 then order the transcript and send that to Mr. Simakov.

13 Just so you get the overview, I'm going to
14 certify the facts that Mr. Simakov is in contempt. The
15 process, which I'll explain in a little more detail, is
16 for him to appear before the district judge, who will
17 evaluate the situation and make a final determination.
18 I have a date from the district judge, who is Judge
19 Chen, for July 20th, it's a Monday, at 11:00 a.m. That
20 hearing is going to be held in her courtroom, which is
21 4F North in the courthouse. So you should appear.
22 Obviously, Mr. Simakov should. Given his past actions
23 in this case, I don't know whether he will or not but
24 he'll have notice and he should appear. I'm just going
25 to read this decision into the record.

1 On a motion for civil contempt, the United
2 States magistrate judge shall certify facts
3 constituting contempt to the district judge unless the
4 case is one in which the magistrate judge presides with
5 the consent of the parties under 28 USC Section 636(c)
6 or it's a misdemeanor case under 18 USC Section 3401.
7 As this case is neither of those, the process is for me
8 to certify facts that constitute the civil contempt to
9 the district judge.

10 This is under 28 USC Section
11 636(e)(6)(B)(3), which provides that the magistrate
12 judge shall forthwith certify the facts to a district
13 judge and may serve or cause to be served upon any
14 person whose behavior is brought into question under
15 this paragraph an order requiring such person to appear
16 before a district judge upon a date certain to show
17 cause why that person should not be adjudged in
18 contempt by reason of the facts so certified.

19 The district judge shall thereupon hear the
20 evidence as to the act or conduct complained of and if
21 it is such as to warrant punishment, punish such person
22 in the same manner and to the same extent as for a
23 contempt committed before the district judge.

24 In this action, the parties have not
25 consented, as I mentioned, to the magistrate judge's

1 jurisdiction and it's not a misdemeanor case proceeding
2 under 18 USC Section 3401. So I'm going to certify the
3 following facts to District Judge Chen under 28 USC
4 Section 636(e)(6)(B)(3). As I noted earlier, Mr.
5 Simakov is ordered to appear before the district judge
6 Pamela Chen in courtroom 4F at 225 Cadman Plaza East,
7 Brooklyn, New York on July 20th, 2015 at 11:00 a.m. to
8 explain why he should not be held in civil contempt and
9 punished for such contempt.

10 For the certification of facts, on November
11 6, 2013, plaintiff Vladislav Reznik, who I'll refer
12 subsequently to him as Reznik or plaintiff, initiated a
13 lawsuit against defendant Vadim Simakov, who I will
14 refer to as Simakov or defendant, for violations of
15 federal law, particularly the Fair Labor Standards Act
16 of 1928 which is at 28 USC Section 201 et seq. We'll
17 refer to that statute as the FLSA, as well as for
18 violations of New York Labor Law. I'll refer to that
19 as Labor Law or NYLL.

20 Defendant didn't answer or respond and so
21 plaintiff asked the clerk of court to make an entry of
22 default, which the clerk did. Those two requests are
23 at 9 and 13 on the docket.

24 On March 26, 2014, plaintiff moved for a
25 default judgment and on June 17, 2014, the district

1 judge granted the motion. Those entries are on the
2 docket at 14 through 19 and the motion grant is at 20.

3 A day later, the clerk of court entered in
4 plaintiff's favor a judgment in the amount of
5 \$18,458.94 as well as an instruction that any unpaid
6 amount of plaintiff's award after 90 days shall
7 increase by 15%. That's on the docket at 21.

8 In connection with judgment enforcement
9 efforts, the plaintiff undertook several actions. On
10 July 15th, 2014, the plaintiff served a copy of a notice
11 of judgment to the debtor upon Simakov by mailing it to
12 his home. The record shows that his home address is
13 114 Pemberton Avenue, Staten Island, New York, 10308.
14 That mailing was made by first class mail. The docket
15 shows at 23 that that mailing occurred. My review of
16 the paperwork here shows that the service was proper
17 under New York CPLR 5222(d), which governs a notice to
18 a judgment debtor.

19 At least the record that we have before us
20 here is that Simakov did not respond or pay the
21 judgment. Also on that same day, July 15, 2014, along
22 with a notice to the judgment debtor, plaintiff
23 attempted to serve a restraining notice. That service
24 was improper or incomplete. I will discuss the New
25 York State law in a little bit of detail.

1 In relevant part, for the service of a
2 restraining notice, New York CPLR 5222(a) requires that
3 a restraining notice be served upon the judgment debtor
4 in the same manner as a summons or "by registered or
5 certified mail, return receipt requested."

6 As I noted earlier, the documents, the
7 notice to the judgment debtor and the restraining
8 notice were just sent by mail with Postal Service form
9 3187, which is called a certificate of mailing. That's
10 not the equivalent of registered or certified mail.
11 These documents are on the docket at 23. You can find
12 a discussion of the registered mail/certified mail
13 issue in a state court case called Jack Mailman and
14 Leonard Flugg DDS, P.C. v. Delvecchio (ph). It's at
15 757 N.Y.S.2d 216 and 217. It's a Second Department
16 case from 2014.

17 Just by way of noting, the content of the
18 restraining notice was generally correct, except it was
19 missing particular information with regard to the
20 calculation of interest, which is also required by the
21 CPLR under Section 5222(a). Even though Simakov
22 received or would be expected to have received the
23 notice by mail, he didn't respond or pay the judgment.

24 Again, on October 3rd, 2014, plaintiff
25 attempted to serve Simakov with an information

1 subpoena. The service of that information subpoena in
2 October, 2014 also did not comply with the rules
3 governing the service of an information subpoena.
4 These documents are on the docket at 24. Exhibit 1 is
5 the information subpoena with the restraining notice.
6 The process server's statement says that he verified
7 that the United States Postal Service delivered the
8 documents using online tracking. Those are Exhibits 2
9 and 3 on docket 24.

10 But similarly as I discussed with the
11 earlier service, both statutes that govern the
12 information subpoena and restraining notice service
13 under the CPLR require that the service be made in the
14 same manner as a summons or by registered or certified
15 mail, both of which require the recipient's signature.
16 You can look at CPLR 5224(a)(3) and New York CPLR
17 5222(a). The documents showing the mailing are on the
18 docket at 24, particularly pages 1 and 2 and 11 through
19 13. Again, for a discussion of the CPLR's requirement,
20 you can look at the Mailman and Flood case.

21 I will just note by way of an aside,
22 plaintiff's mail service did not comply with the
23 requirements for alternative service of a summons by
24 mail, which is provided for at CPLR 5224(a)(3) and CPLR
25 2303(a). You can also look at CPLR Section 312(a).

1 Still, one might expect that Simakov would have
2 received the mailing, even if it wasn't a mailing that
3 would satisfy these particular statutes with regard to
4 the judgment enforcement efforts and still, he didn't
5 respond or pay the judgment.

6 At that point, plaintiff's counsel reached
7 out to the magistrate judge who was then handling this
8 case, who was Judge Azrack, about the defendant's
9 failure to respond. That is noted on the docket at
10 number 24. Judge Azrack's law clerk attempted to call
11 Simakov to schedule a telephone conference about the
12 failure to respond to plaintiff's judgment enforcement
13 discovery request. A male answered the phone,
14 identified himself as Vadim Simakov. Judge Azrack's
15 law clerk identified herself and Simakov hung up on
16 Judge Azrack's law clerk. Judge Azrack's law clerk
17 attempted to call Mr. Simakov again several times
18 without success.

19 Now we get to the point where the service
20 improved. In January, 2015, this case was transferred
21 to me and on January 6, 2015, I issued an order to show
22 cause directing Simakov to respond to the information
23 subpoena or show cause on or before January 23rd, 2015
24 why he should not be required to respond to the
25 information subpoena. I also ordered Simakov to appear

1 before me in person on January 30th, 2015 at 10:00 a.m.
2 in my courtroom here at 225 Cadman Plaza. In the
3 notice, I warned Simakov that if he failed to comply
4 with the order to show cause, I had the authority to
5 certify facts supporting a finding of contempt. I also
6 warned Simakov in that same order to show cause that in
7 the event of a contempt finding, he could face
8 sanctions from the district judge, which may include a
9 fine and/or imprisonment. You can see my order to Mr.
10 Simakov at docket entry 25.

11 Subsequent to my order on January 7th, 2015,
12 plaintiff's process server personally served Simakov at
13 his home at 114 Pemberton Avenue, Staten Island, 10308.
14 That service included the following:

15 A copy of the notice to judgment debtor. 2)
16 A restraining notice. 3) An information subpoena,
17 which included a self-addressed stamped envelope. 4)
18 An entire copy of the civil docket for this case, which
19 as we've noted is Reznik v. Simakov, which was current
20 at that time through January 6th, as well as a copy of
21 my January 6, 2015 order, which is on the docket at
22 number 25. On the docket as well is docket entry 26,
23 which is an affidavit of service by Stephanie
24 Paulicelli (ph).

25 It's noteworthy that according to the

1 documents from Ms. Paulicelli, when she knocked at 114
2 Pemberton Avenue, a white man in his early to mid-40s
3 with blue eyes, blond hair, about 6 feet 3 inches tall,
4 weighing over 200 pounds opened the door and stated
5 that he was not Mr. Simakov and stated that Mr. Simakov
6 no longer lived at that address.

7 Ms. Paulicelli then consulted with Simakov's
8 Facebook public profile and learned that the man who
9 told her that he was not Simakov was in fact Simakov.
10 Then Ms. Paulicelli returned to 114 Pemberton and
11 served Simakov with the aforementioned documents.
12 That's described at docket entry 26.

13 On January 6, 2015, the process server -- is
14 it you, Mr. Belenky? You mailed via priority mail all
15 the same documents that Ms. Paulicelli served to Mr.
16 Simakov at 114 Pemberton Avenue. Then January 8th,
17 2015, the package was delivered to that address
18 according to the United States Postal Service's
19 tracking service. You can see that information on the
20 docket at entry number 27. This combined personal and
21 mail service with the information subpoena, restraining
22 notice and notice of judgment to debtor satisfies the
23 requirements of New York State law with regard to
24 service of judgment enforcement documents.

25 That is the analysis based on looking at the

1 applicable state law, which is CPLR 5222(a), which
2 states that a restraining notice may be served
3 personally in the same manner as a summons, and New
4 York CPLR 5224(a)(3), which does not say, just by way
5 of notice, that an information can be personally served
6 in the same manner as a summons. But to go back to
7 that Mailman and Flood case, 195 Misc.2d 275, and I
8 think I gave you the N.Y.S. earlier, the New York State
9 Supreme Court did an analysis of the service
10 requirements and said that an information subpoena may
11 alternatively be served pursuant to 2303 in the same
12 manner as a summons. The annotations to the statute
13 indicate that personal service is acceptable for
14 service of an information subpoena. A report to the
15 state legislature states that CPLR Section 5224(a) is
16 derived from various portions of the previous Civil
17 Procedure Act, which was known as the Civil Practice
18 Act, and Section 5224(a)'s service requirements for
19 information subpoena, the notation is the following:

20 Although Section 782-A(4) provided for
21 service of information subpoena by ordinary mail, since
22 failure of a person to whom the subpoena is directed to
23 respond within seven days is punishable as a contempt,
24 expansion of this procedure to other persons dictates a
25 manner of service better calculated to insure receipt.

1 Then paragraph (3) of subdivision A requires
2 that if service is not made personally, as with other
3 subpoenas, it can be made by registered or certified
4 mail. The requirement that original copying questions
5 be enclosed is similar to that of the former Section
6 783-A(3)(c) and was designed to enabled persons served
7 to keep a record of the event without undue burden.

8 What's worth noting is the Mr. Simakov has
9 now been sent multiple copies of the judgment
10 enforcement documents. Ms. Paulicelli's personal
11 service of the information subpoena, restraining notice
12 and other documents upon Simakov at his dwelling place
13 in the State of New York appears to satisfy the
14 personal service part of CPLR 308(2). Her affidavit is
15 at document 26 on the docket. Mr. Belenky's mail
16 service of the same documents to Simakov at the last-
17 known address satisfied the mailing requirements of
18 CPLR 308(2). Together, it appears that service wsa
19 complete and proper. Given the multiple notices that
20 Mr. Simakov was sent, including personal service, it
21 appears that he had more than fair notice of the
22 information subpoena and supporting documents.

23 Additionally, as to this Court's own
24 requirements, the personal service and mailing service
25 was adequate service of the order to show cause.

1 Additionally, because Ms. Paulicelli personally served
2 the information subpoena and Mr. Belenky mailed a copy,
3 plaintiff satisfied the statutory requirement that a
4 copy and a original of an information subpoena be
5 served. That requirement can be found in the CPLR at
6 Section 5224(a)(3).

7 Again, by January 23rd, 2015, Simakov had not
8 answered the information subpoena or submitted any
9 documentation or response to the Court's order to show
10 cause. On January 30th, 2015, Simakov did not appear at
11 the order to show cause hearing. That's recorded at
12 the docket entry on 1/30/2015.

13 On February 20th, 2015, plaintiff moved
14 before me for certification of facts to further request
15 that the district judge find Mr. Simakov in contempt.
16 That's on the docket at 28. Plaintiff asked the
17 district judge to order Mr. Simakov to pay \$250 a day
18 until her purged his contempt.

19 On February 24th, 2015, the plaintiff filed
20 an affidavit of service indicating a process server
21 nailed the motion for contempt on defendant's door at
22 the Pemberton address and mailed the motion for
23 contempt to the Pemberton address. This nail and mail
24 service complies with CPLR Section 308(4), which
25 requires that personal service upon a person can be

1 made, where service under paragraphs 1 and 2 cannot be
2 made with due diligence, by affixing the subpoena to
3 the door of the dwelling or usual place of abode within
4 the state of the person to be served and mailing the
5 subpoena to such person at his last-known residence.
6 The process server was unable to effect service
7 pursuant to 308(2) because Mr. Simakov was out of town,
8 then he wouldn't answer his door, as can be seen in the
9 process server's affidavit, number 29. Additionally,
10 under this Court's own rules, this service would be
11 more than satisfactory. Again, Simakov has not
12 responded to the Court after the contempt motion was
13 provided.

14 So that's the factual background, the bottom
15 line being that the initial efforts on service didn't
16 satisfy New York State's judgment enforcement service
17 requirements but once we got to January, the service
18 was appropriate and satisfactory. I do note the
19 history of efforts from the summer and the fall just to
20 underscore the fact that Mr. Simakov has had repeated
21 effort by the plaintiff to make sure that he knows
22 about the judgment and has had an opportunity to
23 comply. I think also his evasiveness in Ms.
24 Paulicelli's initial effort to serve him personally is
25 worth noting.

1 Having made the above certification of
2 facts, I'm now going to talk about the relevant law and
3 discuss those facts. The outcome of my recommendation
4 is that I recommend that the district judge find Mr.
5 Simakov in contempt and order him to pay the requested
6 \$250 a day until he purges that contempt.

7 While \$250 a day is a significant amount of
8 money in connection with a judgment that the principal
9 was less than \$19,000, the significant efforts by
10 plaintiff to enforce that judgment show, as I just
11 noted, that Mr. Simakov has made serious efforts to
12 avoid service. Concomitant results of his efforts to
13 avoid service are in part that he's avoiding the entire
14 judgment enforcement process. \$250 a day may
15 incentivize him to act more responsibly with regard to
16 his obligation to satisfy the judgment.

17 Federal Rule of Civil Procedure 69 allows
18 for the enforcement of a money judgment by a writ of
19 execution in accordance with the procedure of the state
20 where the court is located. That's Federal Rule of
21 Civil Procedure 69(a)(1). In aid of the judgment or
22 execution, the judgment creditor may -- I'm giving a
23 slightly abbreviated version but this is the relevant
24 part -- may obtain discovery from any person including
25 the judgment debtor, as provided in these rules or by

1 the procedure of the state where the court is located.
2 That's Federal Rule of Civil Procedure 69(a)(2).

3 New York law allows a judgment creditor to
4 compel disclosure by subpoena of matters relevant to
5 the satisfaction of the judgment. I've already talked
6 in fair detail about CPLR Section 5223. A helpful case
7 in noting how an information subpoena may be issued
8 without a court order to compel disclosure of all
9 matters relevant to the satisfaction of judgment in
10 federal court when applying the state rules for the
11 enforcement of a judgment is Jacobsen v. Moler and
12 Moler, Inc. It's on the docket at 02-CV-6316. It's a
13 Judge Korman case. It's published in West Law 2007,
14 1989260. You can look at page 1. It's an Eastern
15 District case, obviously, from July 5th, 2007.

16 As I stated above in my certification of the
17 facts, plaintiff's January 7th personal service and
18 January 8th mail service in 2015 of the information
19 subpoena, restraining notice, notice to judgment debtor
20 and my January 26th, 2015 order were properly served
21 upon Simakov in the same manner of a summons, going
22 back to the CPLR. That's CPLR 5222(a), 5224(a)(3),
23 2303. As I previously noted, a copy and an original
24 and a self-addressed, stamped envelope were provided to
25 Mr. Simakov. Again, those docket entries at 26 and 27

1 report on that.

2 The recipient of an information subpoena is
3 required to respond within seven days under CPLR
4 5224(a)(3). If the recipient to comply, CPLR Section
5 2308(a) states that failure to comply a "judicial"
6 order issued by an officer of the court shall be
7 punishable by contempt of court. Here, plaintiff's
8 attorney as an officer of the court issued the
9 information subpoena and the CPLR authorized a contempt
10 sanction.

11 Although New York State law authorizes
12 contempt proceedings, federal standards also govern the
13 determination of contempt of my January 6, 2015 order.
14 It's a firmly established principle that federal courts
15 possess the inherent power to punish for contempt.
16 There are many, many cases on this. Just a couple of
17 examples are a case called Barage v. Feely (ph), 959
18 F.Supp. 631, 634 (S.D.N.Y. 1997); Lead Singer, Inc. v.
19 Cole (ph). It's a Southern District case, 05-CV-5606.
20 It's published in 2006 W.L. 2266312 (S.D.N.Y. August
21 4th, 2006).

22 A court may hold in contempt a person who,
23 having been served, fails without adequate excuse to
24 obey a subpoena and order related to it under Federal
25 Rule of Civil Procedure 45(g). Despite proper notice

1 of the information subpoena and my January 6, 2015
2 order, Simakov failed to comply with both.

3 As relief from Mr. Simakov's failure to
4 comply with the information subpoena, plaintiff
5 requests that I certify facts supporting a finding of
6 contempt and requests that I also recommend to the
7 district judge that civil contempt sanctions in the
8 amount of \$250 per day be ordered against Simakov until
9 his contempt is purged and he responds to the
10 information subpoena.

11 A party may be held in civil contempt for
12 failure to comply with a court order if: 1) The order
13 the contemnor failed to comply with is clear and
14 unambiguous; 2) the proof of non-compliance is clear
15 and unambiguous; and 3) the contemnor has not
16 diligently attempted to comply in a reasonable manner.
17 That's from Paramedics Electromedicina Commercial
18 Limitada v. G.E. Med Systems Info Technologies, Inc.
19 (ph), 369 F.3d 645, 655 (Second Circuit 2004).

20 The burden is on the movant to show by clear
21 and convincing evidence that a finding of contempt is
22 warranted. That's also in the Paramedics case, which
23 cites Latino Officers Association City of New York,
24 Inc. v. the City of New York, 558 F.3d 159 at 164
25 (Second Circuit 2009). Where the movant seeks to

1 adjudicate a person in civil contempt under Local Rule
2 83.6, the procedures are specified to be followed.
3 Local Civil Rule 83.6 requires personal service along
4 with a copy of Rule 83.6 allowing for recovery of
5 reasonable counsel fees and allowing the Court to order
6 the contemnor's arrest.

7 The motion for contempt satisfies these
8 elements. Mr. Simakov has not complied with the
9 information subpoena or my order. My order of January
10 6th was unambiguous and clear as to his obligation to
11 appear in court on January 30th, 2015. The proof of his
12 non-compliance is clear and unambiguous. Plaintiff has
13 attested in various affidavits of service that are on
14 the docket that he received mail service of the
15 information subpoena twice, personal service once, as
16 well as mail and personal service of my January 6th,
17 2015 order.

18 I already went over plaintiff's statements
19 with regard to the process server's affidavit and
20 supporting evidence, which include a copy of a
21 Department of Finance record showing Mr. Simakov's
22 address as well as his Facebook photograph, that he
23 does in fact live at 114 Pemberton Avenue in Staten
24 Island, New York, and his non-compliance with my order
25 of January 6th, 2015 is clear through plaintiff's

1 attestation that Mr. Simakov has still not responded to
2 the information subpoena as well as my own observation
3 that Mr. Simakov did not show up at the January
4 hearing. Additionally, at that hearing, plaintiff's
5 counsel and I waited almost forty minutes for Mr.
6 Simakov to appear, as evidenced by the fact that a
7 conference was scheduled to begin at 10:00 in the
8 morning and I went on the record to notice his failure
9 to appear with a recording that ended at 10:49 a.m.

10 Mr. Simakov has not attempted to comply in
11 any diligent manner. There's no evidence in the record
12 before the Court, either submitted by plaintiff or to
13 the Court directly, that Simakov has attempted to
14 comply with the information subpoena or with my order.
15 Instead, the evidence is that he has attempted to avoid
16 compliance. Evidence in support of that conclusion is
17 his complete failure to respond, his refusal to speak
18 with Judge Azrack's law clerk or to take her subsequent
19 calls, his lies to the process server who attempted to
20 make personal service about his identity and his later
21 refusal to open the door.

22 In light of the foregoing, I recommend the
23 district judge find that my certification of facts
24 constitutes contempt and hold Mr. Simakov in contempt
25 of the Court.

1 The plaintiff requests that the Court
2 exercise its discretion to order Simakov to pay \$250 a
3 day until he purges his contempt. The Court has broad
4 discretion to devise coercive sanctions to encourage
5 compliance with court orders as set forth in the
6 Paramedics case at 657.

7 When imposing penalties for a coercive
8 purpose, the district court should consider several
9 factors including: 1) the character and magnitude of
10 the harm threatened by the party's non-compliance; 2)
11 the efficacy of the sanction in bringing about
12 compliance; and 3) the contemnor's ability to pay.
13 That's a citation from Leser v. U.S. Bank National
14 Association, 09-CV-2362. It's published at 2011 W.L.
15 1004708 at 11 (E.D.N.Y. March, 2011).

16 In this case, as I have already outlined,
17 Mr. Simakov's self-serving non-compliance prevents
18 plaintiff from obtaining the damage award which this
19 Court determined in his favor following Mr. Simakov's
20 failure to participate in the case. This failure to
21 pay inflicts significant harm on plaintiff, who has
22 diligently attempted to prosecute his case and proven
23 so through no small expenditure of time, energy and
24 money.

25 There is no indication that a sanction of a

1 fixed amount would persuade Mr. Simakov to comply. In
2 contrast, a sanction that increases over time would
3 better reflect the consequences of his continued non-
4 compliance as well as incentivize him to limit the
5 scope or size of any such sanction by appearing in
6 court and responding to the Court's orders. And there
7 is no evidence in the record that Mr. Simakov would be
8 unable to pay this sanction. The contemnor bears the
9 burden of production in raising a defense of inability
10 to pay the sanction. That's also set forth in the
11 Paramedics at 658.

12 I therefore respectfully recommend that the
13 district judge, in the event she agrees with me that
14 Mr. Simakov is in contempt of court, issue an order
15 that unless Mr. Simakov fully complies with the court
16 order to comply with the information subpoena within a
17 week of service of the Court's order, that he be
18 required to pay plaintiff a sanction of \$250 a day
19 while he remains non-compliant.

20 Plaintiff has not suggested the sanction of
21 arresting and imprisoning Mr. Simakov. That's evidence
22 from the plaintiff's filings on the docket at 28.
23 Before the Court can hold a person in civil contempt,
24 due process requires that a person be given notice that
25 he or she is a defendant in a contempt hearing and if

1 he or she faces possible incarceration, that he or she
2 be afforded the right to counsel. That's in the Leser.
3 In Leser, it should be noted that the court declined to
4 order the contemnor's arrest where a less drastic
5 remedy might insure compliance.

6 It's not apparent from the record that Mr.
7 Simakov was told of his right to counsel, although the
8 transcript, which the plaintiff must serve upon Mr.
9 Simakov when it's available, will serve as notice.
10 Additionally, the Court will mail Mr. Simakov a copy of
11 this transcript and of the order.

12 Should Mr. Simakov continue in his non-
13 compliance, he will have demonstrated that sanctions
14 less severe than the arrest of his person are
15 ineffective. The Court therefore recommends that if
16 within sixty days of the district court order Mr.
17 Simakov fails to certify to the Court in writing his
18 full compliance of the information subpoena and any
19 contempt penalties or pays the full underlying judgment
20 including interest, that plaintiff be permitted to move
21 for Mr. Simakov's arrest. Mr. Simakov would be
22 entitled to be represented by counsel in connection
23 with any arrest.

24 Pursuant to 28 USC Section 636(e)(6)(B)(3),
25 the undersigned certifies the facts discussed to

1 District Judge Chen and makes the recommendations just
2 stated. Mr. Simakov must appear before the district
3 judge, District Judge Pamela K. Chen, in courtroom 4F,
4 225 Cadman Plaza East, Brooklyn, New York, 11201 on
5 July 20th at 11:00 a.m. in courtroom 4F North to show
6 cause as to why he should not be held in civil contempt
7 and punished for such contempt.

8 Up to seven days before the hearing, Mr.
9 Simakov may file a response for the district judge to
10 consider during the hearing. Plaintiff is directed to
11 serve a copy of the certification of facts and
12 recommendation on Mr. Simakov once it's available on
13 the docket on or before -- let's say within five days
14 of the entry of the transcript on the docket and no
15 later than -- let me just make sure I have the date --
16 no later than July 1st, 2015 and then file proof of
17 service by July 6th, 2015. Additionally, in accordance
18 with the local rules, particularly Rule 83.6, plaintiff
19 must serve a copy of the order that will be entered,
20 the transcript and a copy of the Local Rule 83.6.

21 I believe that is everything. Any questions
22 or issues for you, Mr. Belenky?

23 MR. BELENKY: Regarding the service of
24 papers, do we need to serve him personally?

25 THE COURT: Yes. We'll mail him a copy but

1 you need to serve him personally because he may find
2 himself subject to the contempt. Additionally, if he
3 fails to comply, then he may ultimately be subject to
4 arrest, so he's entitled to notice. If you look at
5 Local Rule 83.6, personal service is required, all
6 right?

7 MR. BELENKY: Yes, your Honor.

8 THE COURT: Anything else?

9 MR. BELENKY: Do you know when the
10 transcript of this is going to be available?

11 THE COURT: We are going to order it today.
12 It should be available in a day or two.

13 MR. BELENKY: Okay.

14 THE COURT: After the weekend. If it
15 doesn't appear on the docket, then you should call my
16 deputy and we'll see what we can do about making sure
17 it's available, okay?

18 MR. BELENKY: Yes.

19 THE COURT: Thank you. Bye.

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18 I certify that the foregoing is a correct
19 transcript from the electronic sound recording of the
20 proceedings in the above-entitled matter.
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25 ELIZABETH BARRON

June 22, 2015